

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Review of the Commission's Broadcast
and Cable Equal Employment
Opportunity Rules and Policies)

MM Docket No. 98-204

and)

Termination of the EEO Streamlining
Proceeding)

MM Docket No. 96-16

COMMENTS OF COLE, RAYWID & BRAVERMAN

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SUMMARY

Commenters commend the Commission for its decision to revise the FCC's EEO rules to cure the constitutional infirmities articulated by the court in *Lutheran Church-Missouri Synod v. FCC*, No. 97-1116 (D.C. Cir. April 14, 1998). This proceeding also presents an excellent opportunity for the Commission to modify its EEO rules to minimize unnecessary administrative recordkeeping and reporting requirements. These requirements in the Commission's current EEO rules have outlived their usefulness, as evidenced by the industry's performance in recruiting, hiring and promoting women and minorities throughout its employment ranks. Therefore, while Commenters endorse the Commission's proposed retention of certain EEO practices as important, Commenters respectfully submit these Comments to propose the elimination of certain onerous and constitutionally infirm EEO program requirements, and to suggest alternative and more efficient means to achieve the goals of equal employment opportunity specified by Congress in the Communications Act.

As more fully discussed below, Commenters' propose the following modifications:

- Allowing cable entities to implement and maintain employment recruitment policies tailored to the unique characteristics of the entities' local markets;
- Modifying self-assessment obligations to more accurately capture cable entities' EEO practices;
- Maintaining current recordkeeping requirements to demonstrate continued operator compliance with the proposed open and effective recruitment processes;
- Revising annual EEO reporting forms to reflect amended EEO requirements;
- Conforming enforcement mechanisms to any EEO rule revisions, leaving intact annual reporting requirements and random on-site auditing.

Commenters believe that these modifications—in addition to comporting with the holding in *Lutheran Church*—will best allow cable entities to implement and maintain effective, flexible and proactive EEO programs which the Commission may review and regulate consistent with congressional intent. The cable industry's commitment to sound EEO policies and practices underscores Commenters' proposed revisions to the FCC's EEO rules, and suggests that there is little reason to increase or further regulate how such entities perform their EEO functions. Indeed, increased reporting and recordkeeping requirements, or even maintaining certain current EEO reporting requirements, would only serve to continue to limit resources and abilities that cable entities could otherwise use to implement and perfect EEO programs.

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COMMENTS OF COLE, RAYWID & BRAVERMAN

The law firm of Cole, Raywid & Braverman, on behalf of the cable operators listed below (collectively "Commenters"), submits these Comments in response to the Commission's Notice of Proposed Rule Making ("NPRM") released November 20, 1998, in the captioned proceeding.

I. INTRODUCTION

Commenters have and continue to embrace the spirit and objectives of the statutory equal employment opportunity ("EEO") provisions set forth in Section 554 of the Communications Act, 47 U.S.C. § 554, and have fulfilled the specific EEO program requirements articulated by the Federal Communications Commission ("Commission" or "FCC") in the FCC's EEO rules for cable television entities.¹ Indeed, since the adoption of federal EEO requirements in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) ("Cable Act"), cable industry entities have steadily expanded and enhanced their equal employment opportunity programs and recruitment efforts, providing job openings and opportunities to applicants with a

¹ 47 C.F.R. § 76.71 *et. seq.*

wide array of backgrounds and interests. As competitive demands and low unemployment further squeeze entities in search of qualified employees, sound EEO policies and practices are a threshold requirement for attracting the necessary workforce. In other words, effective EEO programs are vital to the lifeblood of the cable industry, namely, its people. This is being, and has been, played out historically and has been recognized by the Commission itself. In its NPRM, the Commission notes the cable industry's increasingly positive EEO performance, specifically in the area of providing opportunities for women and minorities. NPRM ¶ 4. Indeed, in 1998 the Commission reported that total female representation increased to 42.0% and minority representation increased to 29.1% for cable industry employment units of five or more employees in 1997.²

Consistent with the industry's commitment to EEO programs, Commenters commend the Commission for its decision to revise the FCC's EEO rules to cure the constitutional infirmities articulated by the court in *Lutheran Church-Missouri Synod v. FCC*, No. 97-1116 (D.C. Cir. April 14, 1998) ("*Lutheran Church*"), in order to best implement the congressional goals identified in Section 554 of the Communications Act. Perhaps even more significantly, however, this proceeding presents an excellent opportunity for the Commission to modify its EEO rules to minimize unnecessary and burdensome administrative recordkeeping and reporting requirements. These requirements in the Commission's current EEO rules have outlived their usefulness, as evidenced by the industry's performance in recruiting, hiring and promoting women and minorities throughout its employment ranks. Congress expressly granted authority to the Commission in Section 554(d)(4) of the Communications Act, 47 U.S.C. § 554(d)(4), to fine-tune

² 1997 Broadcast and Cable Employment Report (rel. June 23, 1998).

its regulations to best implement statutory EEO directives.³ Therefore, while Commenters endorse the Commission's proposed retention of certain EEO practices as important, Commenters respectfully submit these Comments to propose the modification of certain onerous and constitutionally infirm EEO program requirements, and to suggest alternative and more efficient means to achieve the goals of equal employment opportunity specified by Congress in the Communications Act.

Although Commenters agree with the Commission that certain general and specific EEO program points and practices outlined in NPRM should be maintained in the FCC's EEO rules,⁴

³ Section 554(d)(4) of the Communications Act states, in part, that the Commission has the authority to "amend such [EEO] rules from time to time to the extent necessary to carry out the provisions" of the EEO statute. *See* NPRM ¶ 46.

⁴ The Commission has proposed to maintain the following general EEO program requirements:

- define the responsibility of management to ensure compliance with their policy of equal opportunity, and establish a procedure to review and control supervisory performance;
- inform employees of their EEO program;
- communicate their EEO policy and employment needs to sources of qualified applicants without regard to race, color, religion, national origin, or sex, and solicit their recruitment assistance on a continuing basis;
- conduct a continuing program to exclude all unlawful forms of prejudice from personnel policies and working conditions; and
- conduct a continuing review of job structure and employment practices and adopt measures to ensure equality of opportunity to participate fully in the entity. *See* NPRM ¶ 54.

The Commission has also proposed to maintain the following specific EEO program requirements:

- disseminate the entity's EEO program to employees and job applicants;
- review seniority practices to ensure that they are non-discriminatory;
- examine and eliminate any inequalities in pay or benefits based on race or gender discrimination;
- offer promotions on a non-discriminatory basis;
- cooperate with unions in the development of programs to assure equal employment opportunities;

Commenters propose several modifications to the EEO rules. As more fully discussed below,

Commenters' propose the following modifications:

- Allowing cable entities to implement and maintain employment recruitment policies tailored to the unique characteristics of the entities' local markets;
- Modifying self-assessment obligations to more accurately capture cable entities' EEO practices;
- Maintaining current recordkeeping requirements to demonstrate continued operator compliance with the proposed open and effective recruitment processes;
- Revising annual EEO reporting forms to reflect amended EEO requirements;
- Conforming enforcement mechanisms to any EEO rule revisions, leaving intact annual reporting requirements and random on-site auditing.

Commenters believe that these modifications—in addition to comporting with the holding in *Lutheran Church*—will best allow cable entities to implement and maintain effective, flexible and proactive EEO programs which the Commission may review and regulate consistent with congressional intent. The cable industry's commitment to sound EEO policies and practices underscores Commenters' proposed revisions to the FCC's EEO rules, and suggests that there is little reason to increase or further regulate how such entities perform their EEO functions. Indeed, increased reporting and recordkeeping requirements, or even maintaining certain current EEO reporting requirements, would only serve to continue to limit resources and abilities that cable entities could otherwise use to implement and perfect EEO programs.

Commenters present the following suggested revisions to the FCC's EEO rules for cable operators to best achieve the goals highlighted above.

-
- include non-discrimination clauses in union agreements; and
 - avoid discriminatory selection techniques or tests. *See* NPRM ¶ 55.

II. SPECIFIC RESPONSES TO COMMISSION NPRM PROPOSALS

A. "Open And Effective Recruitment" Policies Should Be Left To The Discretion Of Individual Cable Entities

Effective recruitment for all job vacancies is important to ensure that all qualified applicants are notified of, and have an opportunity to compete on a level playing field for, job openings, and Commenters support the Commission's commitment to "open and effective recruitment" of all potential applicants, including females and minorities. Commenters specifically endorse the Commission's recruitment proposal that "would afford entities the discretion to determine how to conduct recruitment efforts as long as they can demonstrate that their efforts attract a broad cross section of qualified applicants." NPRM ¶ 64.

Although the NPRM suggests several alternative methods to achieve "open and effective recruitment," giving cable entities the latitude to fashion recruitment strategies will result in more individualized and, thus, more effective, programs. Individual cable entities know their local area and referral sources best, and therefore are most qualified to develop, maintain and modify their own recruitment programs and resources. Fixed formulas for recruitment sources cut against customization of recruitment efforts. Two alternatives proposed by the Commission in its NPRM, however, would ignore cable entities' understanding of local demographics, and impose a mechanical and inflexible recruitment requirement.⁵ In addition to eliminating specific constraints on a cable entity's recruiting methods, a discretionary recruitment policy will

⁵ As competing alternatives, the Commission has proposed either (i) to require entities to take specific steps, such as to use a minimum number of recruiting sources, to fill each job vacancy, or (ii) to require entities to use a specific number of recruitment sources, but tailor the number of sources required to the size of the local minority labor force. See NPRM ¶¶ 65-66.

complement other Commission EEO requirements in that it will afford entities greater flexibility to fashion their EEO program.

The Commission itself identifies some of the problems inherent in any requirement for the use of minimum referral sources in recruitment efforts. Significantly, the Commission notes that rigid recruitment requirements "may penalize an entity that does not follow the rule *even where* the entity's recruiting efforts attract a broad cross section of qualified applicants for consideration." NPRM ¶ 65 (emphasis added). This potential adverse effect alone should caution against adopting a specific inflexible recruitment requirement. Even under the Commission's proposal for a semi-flexible recruitment provision, where the number of required female and minority recruitment referral sources would be directly dependent on the percentages of females and minorities in the relevant community (NPRM ¶ 66), it would be burdensome for both the Commission and the responding entity to determine the demographic information and calculate corresponding recruitment obligations, making that approach unworkable. A flexible recruitment obligation that allows a cable entity to develop, maintain and modify its own recruitment programs and resources presents the best method for open and effective recruitment.

The Commission should maintain a great deal of control over any recruitment requirement, while allowing cable entity discretion to set the means of its outreach efforts. Indeed, as discussed above, Commenters support the continued practice of on-site FCC audits and certification of outreach efforts through an annual reporting requirement for all cable entities. These enforcement mechanisms will continue to allow the Commission to correct specific deficient recruitment practices and serve as an effective on-going deterrent to anything less than "open and effective" outreach programs. Moreover, through the certification and audit process,

the Commission would be able to assess and gauge cable entities' efforts to identify female and minority applicants for available openings by reviewing the nature of recruitment sources contacted, the frequency of such contacts and the entities' overall commitment to making potential minority and female employees aware of job vacancies in the cable industry.

Therefore, Commenters support the Commission's proposal to afford discretion to cable entities with respect to their development and maintenance of "open and effective" recruitment strategies. Under this discretionary model, cable entities will continue their efforts to identify recruiting sources that are reflective of the community served. In light of the convincing evidence of the cable industry's successful past EEO performance and continued improvement, Commenters believe that it is reasonable to allow cable entities to set the recruitment methods and policies that best suit each operator.

B. The Commission Should Retain Existing Employer Self-Assessment Rules.

Section 554(d)(2)(F) of the Communications Act, 47 U.S.C. § 554(d)(2)(F), grants the Commission the authority to require cable entities to detail and report—"to the extent possible"—the analyses of their efforts to recruit, hire, promote and use the services of minorities and women, and explain any difficulties encountered in implementing their equal employment opportunity programs. Therefore, given both Congress' express mandate that any Commission reporting requirement not unnecessarily burden cable entities and Commenters' endorsement of the current FCC self-analysis reporting obligation, Commenters propose that the Commission leave the self-analysis reporting requirement intact. The Commission should continue to require cable entities to submit an analysis of their efforts during the previous 12 months to recruit, hire, promote and use the services of minorities and women, and explain any difficulties in

implementing their equal employment opportunity programs as a response to a request on the Supplemental Investigation Sheet ("SIS"), filed by cable entities once every five years. Commenters agree with the Commission that in light of the *Lutheran Church* decision, any reporting requirement should *not* include the use of any employment profiles to determine the adequacy of an entity's EEO efforts. Thus, a cable entity's response to an SIS request for information on self-assessment issues should provide information responsive to the following points:

- Respondent's general protocol for recruiting for job openings, including recruitment sources regularly contacted, and any modifications the respondent may have made to the list of recruitment sources contacted.
- Respondent's policies for ensuring equal and non-discriminatory hiring practices, including: the creation and maintenance of written job descriptions to use for hiring decisions; training of personnel with hiring responsibilities with respect to the respondent's EEO program; efforts to review the respondent's applicant screening and interview process to eliminate discriminatory practices.
- Respondent's efforts to review promotion policies to ensure that promotions are offered in a non-discriminatory and consistent manner, including: training of managerial and supervisory personnel to ensure that the respondent's commitment to non-discriminatory promotions and general EEO policies is understood and practiced; respondent's efforts to ensure open communications with employees to receive and process claims of non-discriminatory promotion practices.
- Information detailing the respondent's efforts to seek out, encourage and track business relationships with female- and minority-owned vendors and contractors.
- Information documenting any difficulties that respondent may have encountered in the implementation of any aspect of its EEO program.

The NPRM notes that entities may file Supplemental Investigation Sheets with the Commission electronically, which might also require respondents to respond to a series of "yes" or "no" questions to detail their EEO program analysis. NPRM ¶ 72. In the event that the Commission adopts an electronic-only filing requirement for future SIS forms, and therefore

modifies SIS forms to include *only* "yes/no" questions, Commenters provide the following list of questions to assist the Commission in determining a series of effective "yes/no" questions to be included in an electronic filing:

- Does respondent regularly contact a pre-determined list of applicant referral sources, including minority and female referral sources, whenever a job opening becomes available?
- If respondent maintains a recruitment resource list, does respondent continually assess the productivity of recruiting and referral sources?
- Does respondent maintain written job descriptions to use for hiring decisions and to help ensure consistent non-discriminatory hiring practices?
- Does respondent undertake continuous review of its applicant screening and interview process to eliminate discriminatory practices?
- Does respondent endeavor to ensure open communications with employees to receive and process claims of non-discriminatory promotion practices?
- Has respondent endeavored to seek out, encourage and track business relationships with female- and minority-owned vendors and contractors?
- If applicable, has respondent made efforts to cooperate with any existing union in the development of EEO programs?
- Does respondent review seniority practices for non-discrimination, and, if so, has it undertaken such a review within the past year?
- Does respondent examine employee pay and benefits for non-discrimination?
- Does respondent include EEO issues as part of any performance reviews it conducts for supervisory or managerial positions?
- Does respondent review applicant selection techniques or tests for possible discriminatory effects?

C. The Commission Should Revise or Sunset Its Recordkeeping Requirements.

In the NPRM, the Commission proposes to "continue requiring . . . cable entities to retain records to prove that they have made good faith efforts to broaden their applicant pools for all

vacancies." NPRM ¶ 73.⁶ In support of this requirement, the Commission notes that it would not be able to "ascertain whether an entity is making sincere efforts to recruit women and minorities into its applicant pools" without adequate records, which could include an entity's recruitment sources, copies of all advertisements and bulletins announcing vacancies, and compilations totalling the race, ethnic origin and gender of all applicants generated by each recruiting source. NPRM ¶ 73. While Commenters agree that a cable entity should be able to provide documentation or records in support of a claim that it has endeavored to practice "open and effective recruitment" and outreach for job vacancies, Commenters support a rule which affords discretion to cable entities with respect to the particular types of outreach information compiled and maintained.

Commenters submit that the rules should be shaped to reflect the marginal utility and practical difficulties of collecting and maintaining certain employment information. Requiring the outreach documentation proposed by the Commission would only serve to increase the already voluminous records that cable entities collect in managing their operations. Therefore, rather than a requiring a detailed list of federally-required records, Commenters propose a discretionary approach which would allow local cable entities to efficiently conform recordkeeping protocols to their customary business practices. Specifically, Commenters suggest that such a rule require cable entities to collect and maintain applicant pool and recruitment records that would enable the Commission to examine a cable entity's outreach efforts. The

⁶ The Commission's proposal flows from its unquestioned authority under Section 554(d)(4) of the Communications Act, which grants the Commission the authority to "amend such [EEO] rules from time to time to the extent necessary to carry out the provisions" of the EEO statute. *See* NPRM ¶ 46.

Commission could ask cable entities to certify their outreach efforts as part of the annual employment Form 395-A or as a question on a Supplemental Investigation Sheet. Additionally, an entity's failure to produce records sufficient to allow the Commission to ascertain the nature and extent of its outreach efforts would effect the Commission's determination as to compliance during an on-site audit. These measures would provide the Commission with a tool to enforce open and effective recruitment, and a deterrent to protect against lax outreach efforts.

Notwithstanding Commenters' discretionary recordkeeping proposal, Commenters oppose the specific records the Commission proposes to collect. The Commission states that cable entities should document and track the racial, gender and ethnic origin classifications of all applicants to allow entities to review the productivity of recruitment efforts, and modify outreach programs, where necessary. Such a requirement risks running afoul of the government-endorsed preferential-employment practices found to violate the equal protection clause of the Fifth Amendment in *Lutheran Church*. Commenters believe that by encouraging the recruitment of specific classifications of applicants, the Commission implicitly would be encouraging preferential hiring of those groups. Rather than require certain outreach thresholds or targets for particular classes, the Commission simply should require non-discriminatory and aggressive outreach to all segments of the population. The Commission could ascertain an entity's outreach efforts by reviewing its recruitment referral list and examining how consistently the entity used those referral sources and any efforts to modify the recruitment list to broaden its applicant pools.

D. The Commission Should Revise Its Annual Employment Forms.

The annual EEO Employment Form 395-A should be revised to reflect the several rule modifications proposed by the Commission and advanced by Commenters herein. Generally,

Commenters favor the process currently used by the Commission, with an annual submission of a Form 395-A, with a Supplemental Investigation Sheet filed once every five years. Specifically, Commenters propose that the Form 395-A be modified as follows, consistent with Commenters' justifications, detailed above, for modifying the FCC's EEO rules:

- Consistent with the Commission's position, Form 395-A Section V.C. (annual job hires) and Section VI (detailing the comparison of the cable entity's workforce with local labor force statistics), should be eliminated.
- Consistent with the Commission's position, revision of Section VII to eliminate annual hiring information for upper-level job sub-categories.
- Retention of current Sections I, II, III, IV, VA., V.B., VII, VIII and IX.

With these proposed revisions, the annual Form 395-A employment report would consist of sections detailing the following: operator identification; community information; "yes/no" questions certifying entity compliance with EEO policy and program requirements; additional voluntary explanatory information; annual employment profile information for tracking industry trends and entity certification of the employment report. Commenters suggest that the Commission should not revise the Form 395-A to request information concerning the total of applicants received from each referral source or the total number of female and the total number of minority applicants received.⁷ Instead, cable entities should be required to maintain such information and make it available to the Commission through on-site or letter audits.

The Supplemental Investigation Sheet should be revised consistent with Commenters' proposal set forth in Section II.B., above. These modifications will significantly streamline the

⁷ See NPRM ¶ 77.

annual employment Form 395-A and Supplemental Investigation Sheet, and, more importantly, properly implement revised FCC EEO rules.

E. The FCC's EEO Enforcement Provisions Should Remain Intact.

Commenters believe that the most effective method for ensuring "open and effective" outreach and continuing EEO compliance is through annual certification, EEO program on-site audits and financial penalties for violations. Specifically, Commenters propose maintaining the current process for filing annual employment Form 395-A's and Supplemental Investigation Sheets (such forms being modified as proposed by Commenters herein), continuing the FCC's program of periodic on-site EEO program audits, and penalizing entities found to violate EEO rules with monetary fines or decertification.⁸

Such a three-pronged enforcement mechanism will require cable entities annually to assess and certify compliance with the Commission's EEO requirements, including outreach and non-discriminatory employment practices, and provide the Commission with an opportunity to verify cable entities' claims with on-site investigation of files and records. Finally, Commenters believe that the Commission's current schedule of sanctions and decertification procedure are appropriate for entities found to violate the outreach and other EEO program commitments. This enforcement scheme and series of penalties constitute the regulatory oversight that is necessary to maintain an adequate incentive for repeat violators to comply with the Commission's EEO rules.


⁸ Commenters endorse the Commission's proposal and pledge to sanction entities for deficiencies in their outreach and EEO program efforts, and *not* for the results of their hiring decisions, subject to the duty to refrain from unlawful discrimination.

CONCLUSION

The current business and legal landscape has provided the Commission with a set of excellent guideposts for reshaping its EEO rules for cable television entities. On the one hand, the court in *Lutheran Church* articulated the constitutional standards under which new EEO rules must operate. On the other hand, the cable industry's recent EEO successes coupled with the competitive employment market suggest that the time is ripe for a flexible and discretionary regulatory approach to EEO concerns. In keeping with this spirit, Commenters have proposed several modifications to the FCC's EEO rules that would advance the congressional objectives set forth in Section 554 of the Communications Act while incorporating significant administrative efficiencies for the industry. For these and the foregoing reasons, Commenters respectfully request that the Commission consider revising the FCC's EEO rules for cable entities to eliminate

costly and burdensome recordkeeping requirements, streamline reporting operations and minimize potential constitutional challenges to the Commission's regulatory oversight role.

Respectfully submitted,

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